Supreme Court, U.S.
FILED
07-231 AUG 17 2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MSA OF MYRTLE BEACH, INC.,
D/B/A ADDY'S HARBOR DODGE,

Petitioner,

v.

SHERRY P. SIMPSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

Thomas C. Brittain
Hearn Brittain & Martin
4614 Oleander Drive
Myrtle Beach, S. C. 29577
(843) 449-8562

J. Gregory Studemeyer
Post Office Box 12201
Columbia, SC 29211
(803) 779-3363

James B. Richardson, Jr.
Counsel of Record
1229 Lincoln Street
Columbia, S. C. 29201
(803) 799-9412

Counsel for Petitioner

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QUESTION PRESENTED

The South Carolina Supreme Court has joined the Federal Trade Commission, the supreme courts of Maryland and Mississippi, and federal district courts in Virginia and Ohio in holding that the Magnuson-Moss Warranty Act forbids arbitration of consumer warranty claims. The Fifth and Eleventh Circuit Courts of Appeals and the supreme courts of three other states hold to the contrary. The question presented by this petition is as follows:

Whether the Magnuson-Moss Warranty Act forbids a predispute agreement to arbitrate consumer warranty claims?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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OPINION BELOW

The opinion of the Supreme Court of South Carolina (App., *infra,* A1) is reported at 373 S.C. 14, 644 S.E.2d 663.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on March 26, 2007. A timely petition for rehearing was denied on May 23, 2007, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The relevant provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312, are reproduced at App., *infra*, A25.

The relevant provision of the Federal Trade Commission's regulation, 15 C.F.R. § 705.3(j), banning predispute agreements to arbitrate warranty claims, is reproduced at App., *infra*, A27.

STATEMENT

This case presents the question of whether the Magnuson-Moss Warranty Act ("MMWA") prohibits predispute agreements to arbitrate consumer warranty claims. Two federal courts of appeals — the Eleventh Circuit and the Fifth Circuit (over the dissent of Chief Judge King) — held in 2002 that the MMWA does not trump the Federal Arbitration Act and that consumer arbitration agreements are not prohibited by the MMWA, despite the Federal Trade Commission's contrary regulation. Until recently the Mississippi Supreme Court was the only contrary appellate authority. Now, the supreme courts of South Carolina and Maryland have rejected the holdings of the Fifth and Eleventh Circuits and have ruled that the MMWA prohibits predispute consumer arbitration agreements, as have district courts in two circuits.

This case originated when respondent, Sherry H. Simpson, filed a complaint in the Horry County, South Carolina, court of common pleas alleging that petitioner,

Addy's Harbor Dodge, violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the value of the vehicle which she traded, artificially increasing the purchase price, and failing to provide all rebates promised. Simpson sought damages consistent with the maximum statutory remedies permitted for violations of these statutes.

Petitioner moved to stay the case and for an order compelling arbitration on the basis of the following arbitration agreement, found in the sales contract:

> 10. ARBITRATION Any and all disputes, claims or controversies between Dealer and Customer * * * arising out of or relating to: (a) automobile warranty, workmanship, or repair; (b) the terms or enforceability of the sale, lease, or financing of any vehicle; (c) any claim of breach of contract, misrepresentation, conversion, fraud, or unfair and deceptive trade practices against Dealer or any officers, directors, agents, employees, or assignees of Dealer; (d) any and all claims under any consumer protection statute; and (e) the validity and scope of this contract, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. * * *

The arbitration agreement, Paragraph 10 of the sales agreement, also contained provisions reserving specified judicial remedies, such as replevin, to the dealer, and prohibiting the award of multiple or punitive damages.[1]

The court of common pleas denied the dealer's motion to compel arbitration. The dealer appealed. The

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[1] The arbitration agreement is quoted in full in the opinion of the lower court, APP., *infra*, A2.

case was certified to the South Carolina Supreme Court, bypassing the South Carolina Court of Appeals.

The South Carolina Supreme Court ruled that the arbitration agreement was unconscionable and hence invalid. The court held that it is unconscionable for a dealer to place in a sales agreement a provision calling for arbitration of warranty disputes because the Magnuson-Moss Warranty Act forbids such predispute arbitration agreements.[2]

The court denied a petition for rehearing which pointed out, among other things, that the ruling was in conflict with rulings of the federal courts of appeals.

REASONS FOR GRANTING THE WRIT

I. State courts, lower federal courts, and the Federal Trade Commission are hopelessly divided over whether the Magnuson-Moss Warranty Act forbids predispute agreements to arbitrate consumer warranty claims. The validity of a vast number of such agreements is now uncertain. Since state courts are not bound to follow the statutory construction decisions of lower federal courts, only this Court can resolve the conflict.

Five years ago the Eleventh Circuit described the issue presented here as an important one.[3] The issue has

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[2] The court further held that an agreement to limit punitive and multiple damages is unconscionable. Finally, the court held that an agreement which assigns all claims of the consumer to arbitration, while reserving specified judicial remedies to the seller, lacks mutuality and is unconscionable for that reason.

[3] *Davis v. Southern Energy Homes, Inc.*, 305 F.3d

(continued...)

become even more important now than it was then. The supreme courts of South Carolina and Maryland, acting within a week of each other, have rejected the decisions of the Fifth and Eleventh Circuits and have rejuvenated the FTC's anti-arbitration regulation. These two state supreme court decisions, supported by an earlier state supreme court decision in Mississippi and by federal district court decisions in at least two circuits, throw into confusion the validity of arbitration provisions contained in a vast number of warranty agreements nationwide.

* * * * *

In 1975 the Federal Trade Commission adopted legislative regulations under the authority of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312. The FTC found that the MMWA prohibits a predispute agreement for binding arbitration of consumer warranty disputes. 16 C.F.R. § 703.5(j).

Eight years later, in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), a succession of cases began in which this Court found that the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, created a strong national policy in favor of arbitration.

In light of these decisions the FTC in 1999 reexamined its position that the MMWA prohibits predispute arbitration agreements. Reflecting the FTC's anti-arbitration bias, the agency reaffirmed its position that arbitration agreements are banned by the MMWA as detrimental to consumers.[4] The FTC announced that its

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[3](...continued)
1268, 1270 (11th Cir. 2002), *cert. den.*, 538 U.S. 945.

[4]

Suffice it to add that the Federal Trade Commission's anti-arbitration bias,

(continued...)

regulations "will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration." 64 Fed. Reg. 19700, 19708-09 (1999). One year later this Court found that the national policy favoring arbitration applies equally to consumer disputes. *Green Tree Fin. Corp. — Alabama v. Randolph*, 531 U.S. 79 (2000). Indeed, "Congress when enacting the [FAA] had the needs of consumers * * * in mind." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

In 2002, the Mississippi Supreme Court agreed with the FTC's view and held that the MMWA prohibits predispute arbitration agreements.[5]

The next year, over a strong dissent by Chief Judge King, the Fifth Circuit Court of Appeals rejected the view of the FTC and held that the MMWA does not supersede the Federal Arbitration Act.[6] Three months later the Eleventh Circuit followed suit, overruling an earlier

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[4](...continued)
expressed in its 1999 renewal of the view that "Section 110 (a)(3) of the [Magnuson -Moss] Warranty Act . . . clearly implies that a[n] [informal dispute settlement] mechanism's decision cannot be legally binding, . . . is completely out-of-step with both Congress' and the U.S. Supreme Court's views regarding arbitration not being inherently hostile to consumers' interests.

Koons Ford of Baltimore, Inc. v. Lobach, 398 Md. 38, 919 A.2d 722 (2007) (dissenting opinion of Harrell, J.).

[5] *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002).

[6] *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002).

decision.[7] The Eleventh Circuit, however, disagreed with the Fifth Circuit on the reason why the FTC regulation was invalid.[8]

Up until March of this year, three state supreme courts had likewise rejected the view of the Federal Trade Commission.[9] However, district courts in Virginia and

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[7] *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), *cert. den.*, 538 U.S. 945, *overruling sub silentio Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997).

[8] The Fifth Circuit had found that ". . . Congress has directly spoken to the precise question at issue," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Hence, there was no need to decide whether the agency's interpretation was reasonable. The Eleventh Circuit, by contrast, found that Congress did not speak to the question, or only ambiguously. Hence, it was necessary to determine whether the FTC's interpretation was reasonable. The agency's interpretation was found to be unreasonable.

[9] *Southern Energy Homes, Inc. v. Ard*, 772 So.2d 1131 (Ala. 2000) (four of nine justices dissenting) (*overruling Southern Energy Homes, Inc. v. Lee*, 732 So.2d 994 (Ala.1999)); *Borowiec v. Gateway 2000, Inc.*, 209 Ill.2d 376, 808 N.E.2d 957 (2004) (three of seven justices dissenting); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001), *reversing In re Van Blarcum*, 19 S.W.3d 484, 491–92 (Tex. Civ. App. 2000). In accord are intermediate appellate court decisions from Michigan, Florida, Louisiana, and Georgia, but the supreme courts of those states have not reached the issue. *See: Abela v. General Motors Corp.*, 257 Mich.App. 513, 669 N.W.2d 271 (2003); *Stacy David, Inc. v. Consuegra*, 845 So.2d 303 (Fla. App. 2003); *Howell v. Cappaert Manufactured Housing, Inc.*, 819 So.2d 461 (La.

(continued...)

Ohio had sustained the FTC regulations.[10]

So the matter stood until March of 2007 when the Maryland Supreme Court and the South Carolina Supreme Court, in decisions rendered the same week, became the second and third state appellate courts to sustain the view of the FTC that the MMWA bans any predispute agreement to arbitrate consumer warranty claims. *Koons Ford of Baltimore, Inc. v. Lobach*, 398 Md. 38, 919 A.2d 722 (2007); *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 644 S.E.2d 663 (2007).

Vast numbers of consumer warranty agreements issued annually call for arbitration of warranty claims. Such warranty arbitration agreements are now unenforceable in the state courts of Mississippi, Maryland, and South Carolina, and in both federal district courts of Virginia as well as in the northern federal district of Ohio. They are enforceable in the state courts of seven other states, and in federal courts sitting in the states comprising the Fifth and Eleventh Circuits. (Those two courts of appeals agree that the FTC regulation is invalid but they cannot agree on *why* it is invalid.) The

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[9](...continued)
App. 2002); *Results Oriented, Inc. v. Crawford*, 245 Ga. App. 432, 538 S.E.2d 73 (2000), *aff'd on other grounds, Crawford v. Results Oriented, Inc.*, 273 Ga. 884, 548 S.E.2d 342 (2001). These state courts followed the Fifth and Eleventh Circuits' interpretation of the MMWA only because they chose to, not because they must. *See Lockhart v. Fretwell*, 506 U.S. 364 (1993) (Thomas, J., concurring). The only federal court whose interpretation of a federal statute is binding upon state courts is the United States Supreme Court.

[10] *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958 (W.D. Va. 2000); *Browne v. Kline Tysons Imports, Inc.*, 190 F.Supp. 2d 827 (E.D. Va. 2002); *Rickard v. Teynor's Homes, Inc.*, 279 F.Supp.2d 910, 921 (N .D. Ohio 2003).

enforceability of such agreements is undetermined in the forty states whose courts have yet to reach the issue, as well as in federal courts sitting outside the Fifth Circuit, the Eleventh Circuit, Virginia, and the northern district of Ohio. This disharmony is sure to grow as time passes.[11]

Thus, the situation has quickly grown chaotic on a national scale. Vast numbers of arbitration agreements are now unenforceable in the courts of three states and are of doubtful validity everywhere else. The previously discredited FTC regulation has been rejuvenated.

The disharmony created by these opposite federal and state court constructions of the MMWA is intolerable. For example, because the Fifth Circuit's federal statutory interpretation is not binding upon the Mississippi Supreme Court, a warranty arbitration agreement will be

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[11] The recent South Carolina and Maryland decisions are not aberrant. Overall, nearly as many state supreme court justices — 22 — have voted to sustain the FTC's view as have voted — 24 — to reject it. In the federal lower court system, the Eleventh Circuit's panel decision in *Davis* rejecting the regulation was unanimous but the Fifth Circuit's panel decision in *Walton* was divided. And many more federal district courts have sustained the regulation than have rejected it. *See, e.g., Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958, 963–65 (W.D. Va. 2000); *Browne v. Kline Tysons Imports, Inc.*, 190 F.Supp.2d 827, 830–31 (E.D. Va. 2002); *Rickard v. Teynor's Homes, Inc.*, 279 F.Supp.2d 910, 921 (N .D. Ohio 2003); *Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530, 1538–39 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997) (cited with approved by the FTC, 64 Fed. Reg. 19708 n.72 (1999), but *overruled sub silentio* by *Davis v. Southern Energy Homes, Inc., supra*); *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D. Ala. 1997), *remanded on jurisdictional grounds*, 188 F.3d 1294 (11th Cir. 1999); *Rhode v. E&T Investments, Inc.*, 6 F.Supp.2d 1322 (M.D. Ala. 1998); *Raesly v. Grand Housing, Inc.*, 105 F.Supp.2d 562, 573 (S.D. Miss. 2000).

enforced today in a federal district court sitting in that state but will *not* be enforced in a state court sitting next door. In the absence of a decision by this Court, the same disharmony will prevail in Maryland and in South Carolina if the Fourth Circuit should join the Fifth and Eleventh Circuits in sustaining warranty arbitration agreements. Only this Court has the authority to remedy this unacceptable discord between state courts, lower federal courts, and a federal agency on an important matter of federal statutory construction, controlling the validity of literally millions of arbitration agreements.

The decision in the case at bar denies the benefit of the Federal Arbitration Act to South Carolina citizens. Consumers in South Carolina, Maryland, and Mississippi are now outside the scope of the FAA in warranty disputes while the people of seven other states are within it — and all the rest are uncertain. This unequal and uncertain application of an important national statute is another reason to grant the writ and to achieve uniformity.

II. The decision of the South Carolina Supreme Court is incorrect. The Magnuson-Moss Warranty Act does not forbid predispute agreements to arbitrate consumer warranty claims. The FTC's contrary regulation is invalid.

If a federal statute expressly provides that its remedies are not arbitrable, or if the legislative history of the statute points to that conclusion, or if an "inherent conflict" between arbitration and the statute's underlying purpose exists, then the statute's remedies are exempt from arbitration. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227–38 (1987). The party opposing arbitration has the burden of showing that Congress intended to preclude arbitration of the statutory claim. *Id.* In applying the *McMahon* test, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

1. *The text of the statute says nothing about binding arbitration.*

Binding arbitration in consumer cases was practically unknown when the MMWA was enacted in 1975. The text of the MMWA does not address the subject, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration. Although the MMWA allows warrantors to require that consumers use "informal dispute settlement procedures" before going to court, and allows the FTC to establish rules governing these procedures, the Act does not define "informal dispute settlement procedure." However, the MMWA does make clear that such "informal dispute settlement procedures" are to be used before filing a claim in court. Binding arbitration is a substitute for litigation, not a prerequisite. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that the Age Discrimination in Employment Act does not preclude compulsory arbitration, even though the Act allows the EEOC to pursue "'informal methods of conciliation, conference, and persuasion.'" *Id.* at 29 (quoting 29 U.S.C. § 626(b)). Similarly, the MMWA's prescription of informal methods to settle disputes does not preclude the availability of arbitration if those methods fail.

The fact that the MMWA confers judicial jurisdiction of MMWA claims is no evidence of congressional intent to preclude arbitration. *See McMahon*, 482 U.S. at 227 (finding that a provision of the Securities Exchange Act conferring "exclusive jurisdiction of violations of this title" did not preclude arbitration of claims); *Gilmer*, 500 U.S. at 29 (rejecting the argument that

compulsory arbitration under the ADEA is improper because the statute provides claimants with a judicial forum); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996) ("[A] statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in a federal court."). It was necessary for Congress explicitly to confer jurisdiction upon courts to hear such actions. It was unnecessary for Congress to do anything to facilitate arbitration, since arbitration is a matter of contractual agreement calling for no governmental forum.

The "informal dispute settlement procedure" prescribed by the MMWA is a prelude to a formal, binding settlement procedure — either judicial or arbitral. Binding arbitration cannot be considered to be an "informal dispute settlement procedure". Arbitration therefore falls outside the terms of the MMWA and outside the FTC's power to prescribe regulations.

The text of the MMWA does not evince a congressional intent to prevent the use of binding arbitration.

2. *The MMWA's legislative history does not show that Congress intended to withhold an arbitral remedy.*

"*Binding* arbitration" is not discussed in the legislative history of the MMWA, but a Senate report does refer to "*formal* arbitration" as a possible sequel to the "informal dispute resolution mechanism" if the informal mechanism does not produce a resolution:

> Subsection (a) of this section declares that it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation or formal arbitration. This subsection is

merely a statement of policy and has no operative effect.

S. Rep. No. 91-876, at 22-23 (1970). *See In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 488–89 (Tex. 2001) ("this passage arguably demonstrates that Congress contemplated a consumer's resort to courts or binding arbitration if the informal dispute settlement mechanism did not resolve the dispute"); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002) (quoting this report and italicizing the words "or formal arbitration").

That history does, however, show that any "informal dispute settlement procedure," if unsuccessful, was meant to be a non-binding prelude to a binding resolution. For example, the House Report on the MMWA stated that "[a]n adverse decision in any informal dispute settlement procedure would not be a bar to a civil action on the warranty involved in the proceeding * * *." H.R. Rep. No. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7723. The Conference Committee report also indicates that if a consumer chose not to pursue an informal dispute settlement procedure, the consumer could still pursue "all alternative *avenues* of redress." S. Conf. Rep. No. 93-1408 (1974), reprinted in 1974 U.S.C.C.A.N. 7755, 7758 (emphasis added). If there were only one means of redress — litigation — there would be *no* "alternative avenue."[12]

3. *There is no inherent conflict between the MMWA and the Federal Arbitration Act. It*

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[12] *But see* A. Lamis, "The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act," 15 LOY. CONSUMER L.REV. 173 (2003) (criticizing superficial legislative history research done by Fifth and Eleventh Circuits and concluding that Congress meant to proscribe binding arbitration).

would be hard to think of a claim better suited to arbitration than a warranty claim.

The MMWA was enacted in order to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). The House Report on the MMWA states that "[t]he purpose of this legislation is (1) to make warranties on consumer products more readily understood and enforceable, (2) to provide the Federal Trade Commission (FTC) with means of better protecting consumers and (3) to authorize appropriations for the operations of the FTC for fiscal years 1975, 1976, and 1977." There is no inherent conflict between arbitration and these purposes. Consumers can vindicate their rights under warranties in an arbitral forum just as robustly as in court — with less expense and faster. Arbitration is not inherently unfair to consumers. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("Congress, when enacting the [FAA], had the needs of consumers . . . in mind."). Although the legislative history of the MMWA expresses a concern with the unequal bargaining power of consumers, see S. Rep. No. 93-151, at 22-23 (1973), a perception of unequal bargaining power is not enough to hold arbitration agreements unenforceable. *See Gilmer*, 500 U.S. 33. No inherent conflict exists between the MMWA and the FAA.

Neither the text, the legislative history, nor the purpose of the MMWA suggest a congressional intent to bar arbitration of MMWA written warranty claims. The clear congressional intent in favor of enforcing valid arbitration agreements controls in this case.

4. *The FTC's contrary regulation is unreasonable.*

As noted above, in 1975 the Federal Trade Commission adopted legislative regulations under the authority of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312. The FTC ruled that the MMWA prohibits a predispute agreement for binding arbitration of

consumer warranty disputes. 16 C.F.R. § 703.5(j). In 1999 the agency reaffirmed its view. 64 Fed. Reg. 19700, 19708 (1999).

Since the FTC's rule is legislative in nature, promulgated under the rule-making authority granted by the MMWA, if Congress did not speak to the issue directly, the agency's interpretation is entitled under *Chevron* analysis to deference unless its is based upon an unreasonable construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Fifth Circuit found that Congress *did* address the issue and did not intend to preclude a predispute binding arbitration agreement. *Walton v. Rose Mobile Homes, LLC, supra.* The Eleventh Circuit found that Congress did *not* directly address the issue, but that the agency's statutory interpretation was unreasonable. *Davis v. Southern Energy Homes, Inc., supra.*

a. Congress spoke to the issue directly.

The text and the legislative history of the MMWA support the conclusion of the Fifth Circuit in *Walton* that Congress did not intend to preclude arbitration of the rights granted consumers n the MMWA. *Walton v. Rose Mobile Homes, LLC, supra.* Nor is there any "inherent conflict" between the purposes of the Act and the arbitral remedy. Those points are discussed above.

b. The agency's interpretation of the statute is unreasonable.

The FTC's approach is that the "informal dispute settlement procedures" which Congress encouraged warrantors to establish and which Congress authorized the agency to regulate must not include binding arbitration because such informal procedures are only a *condition* of going to court, whereas binding arbitration is a *substitute* for going to court. This view misses the point that binding arbitration does not work here as an "informal * * * procedure" contemplated by the Act and

does not operate under that section of the Act at all. It is, instead, an alternative to the post-informal procedure phase of the dispute — *i.e.*, litigation. This Court has held uniformly that the fact that Congress has created a statutory right and a judicial remedy to enforce that right, and has conferred jurisdiction upon courts to hear actions seeking that remedy, does not preclude arbitration under the Federal Arbitration Act as an alternative to litigation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

The FTC may have the rule-making authority to preclude binding arbitration as one of the "informal dispute resolution procedures" devised by warrantors. It does not have the authority to forbid arbitration as an alternative under the FAA to litigation in the post-informal procedure phase of the process.

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Four years ago, commenting on the *Walton* decision, a student writer found it "highly improbable that the Supreme Court would uphold the FTC's interpretation . . . ." The author correctly predicted "confusion in the years to come as the courts begin trying to reverse holdings that were created to reach the outcome commended by the Supreme Court's pro-arbitration jurisprudence, rather than out of a reasoned examination of the best path for administrative law." Recent Decisions, 116 HARV.L.REV.1201, 1208 (2003). That confusion has now reached unacceptable levels. The jurisprudence in the lower courts is fully developed and hopelessly divided. Only this Court can resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Brittain
Hearn Brittain & Martin
4614 Oleander Drive
Myrtle Beach, S. C. 29577
(843) 449-8562

J. Gregory Studemeyer
Post Office Box 12201
Columbia, SC 29211
(803) 779-3363

James B. Richardson, Jr.
Counsel of Record
1229 Lincoln Street
Columbia, S. C. 29201
(803) 799-9412

Counsel for Petitioner.

August 2007.

APPENDICES

A. Opinion No. 26293 of the South Carolina Supreme Court A1

B. Letter-Order of the South Carolina Supreme Court Denying Petition for Rehearing A24

C. Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 ..... A25

D. Federal Trade Commission Rule, 15 C.F.R. § 703.5(j) A27

Appendix A
Opinion of the South Carolina Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherry H. Simpson, Respondent,
v.
MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, Daimler Chrysler Services NA, LLC, and CrossCheck, Inc., Defendants,

of whom MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, is the Appellant.

Appeal from Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26293

Heard November 1, 2006
Filed March 26, 2007

AFFIRMED

Joseph Gregory Studemeyer, of Columbia, for Appellant.

Lawrence Sidney Connor, IV, of Kelaher, Connell & Connor, of Surtside Beach, for Respondent.

CHIEF JUSTICE TOAL: This case arises out of an arbitration clause in an automobile trade-in contract between an automobile dealership and a customer. The automobile dealership filed a motion for protective order and/or to stay and to compel arbitration in response to the customer's civil action. The trial court denied the dealerships's motion on the grounds that the arbitration clause was unconscionable. This appeal followed.

Factual/Procedural Background

Appellant MSA of Myrtle Beach, Inc d/b/a Addy's Harbor Dodge ("Addy's"), a car dealership, and Respondent Sherry H. Simpson ("Simpson") entered into a contract whereby Simpson traded in her 2001 Toyota 4Runner for a new 2004 Dodge Caravan. Directly above the signature line on the first page of the contract, the signee was instructed in bold to "**SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE.**" The additional terms and conditions contained an arbitration clause stating the following:

> 10. ARBITRATION Any and all disputes, claims or controversies between Dealer and Customer or between any officers, directors, agents, employees, or assignees of Dealer and Customer arising out of or relating to: (a) automobile warranty, workmanship, or repair; (b) the terms or enforceability of the sale, lease, or financing of any vehicle; (c) any claim of breach of contract, misrepresentation, conversion, fraud, or unfair and deceptive trade practices against Dealer or any officers, directors, agents, employees, or assignees of Dealer; (d) any and all claims under any consumer protection statute; and (e) the validity and scope of this contract, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties expressly waive all rights to trial by jury on such claims. Provided, however, that nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. The filing fees for arbitration shall be paid by the party initiating arbitration. The arbitrator may allocate the other arbitration fees as he/she deems appropriate. In

addition to any discovery permitted by the Commercial Arbitration rules, any party may take one disposition [sic] of an opposing party. The parties agree to exchange all exhibits to be used in arbitration 7 days before arbitration. The arbitrator shall determine the controversy in accordance with the terms of this contract between the parties and shall not consider any parole evidence which purports to alter, modify, vary, add to, or contradict such contract. The arbitrator shall give effect to all applicable statutes of limitation. Any arbitration under this agreement shall take place in Horry County, South Carolina and Customer agrees that the courts of Horry County , South Carolina shall have exclusive jurisdiction over enforcement of this contract and any award made by any arbitrator pursuant to this contract. In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.

Six months later, Simpson filed a complaint in the Horry County court of common pleas alleging Addy violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the trade-in value of the vehicle, artificially increasing the purchase price, and failing to provide all rebates promised. Simpson sought damages consistent with the maximum statutory remedies permitted for violations of these statutes. Addy's answer denied Simpson's allegations and asserted that the contract between the parties contained an arbitration clause such that the matter should be stayed and that Simpson's only remedy was to file for arbitration. Addy contemporaneously filed a motion for protective order and/or to stay and compel arbitration.

Thereafter, Simpson filed a memorandum in opposition to Addy's motion alleging that the arbitration clause was unconscionable and unenforceable. At the motion hearing, the trial court ordered the parties to attempt mediation. After the parties notified the trial court that mediation failed, the trial court issued an order denying Addy's motion on the grounds that the arbitration clause was unconscionable. Addy filed this appeal.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Addy raises the following issues for review:

I. Did the lower court err in ruling that the arbitration clause was unenforceable without first submitting the issue of enforceability to arbitration?

II. Did the lower court err in denying Addy's motion to stay the civil litigation pending arbitration?

Standard of Review

Arbitrability determinations are subject to de novo review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

Law/Analysis

I. The appropriate forum for determining the validity of the arbitration clause.

As a preliminary matter, Addy contends that the trial court erred in ruling on the arbitration clause's enforceability rather than first submitting that issue of

enforceability to arbitration. We disagree.

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15-48-20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate.[1]

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[1] The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 et seq. (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Although the vehicle trade-in contract at issue in the instant case involves interstate commerce, the contract contains a choice of law provision designating South Carolina law as governing law. Therefore, the UAA governs where, as here, the validity of the choice of law provision is not in issue. Additionally, FAA pre-emption of the UAA is not an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001). This distinction is insignificant in the instant case because the UAA and FAA provisions that apply to the issues are nearly identical. *See* S.C. Code Ann. § 15-48-10(a) (2005) and 9 U.S.C.A. § 2 (1999). Therefore, the analysis under state law is ultimately the same as the analysis under federal law. Moreover, even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at

(continued...)

Id.

Our precedents in this area echo the UAA's policy that the trial court should determine the threshold validity of the arbitration agreement. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous.*, LLC, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. (2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties."). Such rulings are based on the contractual nature of arbitration agreements. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate."). This proposition finds support in other jurisprudence. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of a "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (quoting *AT&T Techs., Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986)). These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Id.* Thus, the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies.

In this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between Simpson and Addy. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," Simpson challenged the validity of the arbitration

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[1](...continued)

364.

provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. See S.C. Code Ann. §15-48-20(a) (2005). Furthermore, because Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.

II. Denial of Addy's motion for protective order and/or to stay and compel arbitration.

Addy argues that the trial court erred in denying Addy's motion for protective order and/or to stay and compel arbitration. We disagree.

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S.C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Despite these clear rules, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no

agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

A. Absence of meaningful choice

Addy argues that the facts do not show that Simpson had no meaningful choice in agreeing to arbitrate. We disagree.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the

plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. *See also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))). There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses in adhesion contracts between commercial entities and consumers. Each transaction is analyzed on its own particular facts in conjunction with the federal and/or state policies favoring arbitration.

We begin our inquiry with a focus on the decisions of courts in Ohio, which have heard numerous cases in the very recent past specifically addressing issues of unconscionability of arbitration clauses embedded in adhesion contracts between automobile retailers and consumers. *See Long v. N. Ill. Classic Auto Brokers*, 2006 WL 3783507 (Ohio Ct. App. 9th Dist. 2006); *Felix v. Ganley Chevrolet, Inc.*, 2006 WL 2507469 (Ohio Ct. App. 8th Dist. 2006); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 9th Dist. 2004); *Battle v. Bill Swad Chevrolet, Inc.*, 746 N.E.2d 1167 (Ohio Ct. App. 10th Dist. 2000). The Ohio courts characterize automobiles as a "necessity" and factor this characterization into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. *See, e.g., Eagle*, 809 N.E.2d at 1175; *cf. Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 85 (N.J. 1960) (invalidating auto manufacturer's standard-form disclaimers of implied warranties because such disclaimers frustrated consumer protection legislation given that in modern times, "automobiles are a common and necessary adjunct of daily life"). In this same context, the Ohio courts have adhered to the idea that sales agreements between consumers and retailers "are subject to considerable skepticism upon review, due to the disparity in

bargaining positions of the parties." *Eagle*, 809 N.E.2d at 1179. Under the Ohio courts' rationale, "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998).

Turning to the instant case, we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Neither party disputes that the contract entered into by Simpson and Addy was an adhesion contract as such contracts are standard in the automobile retail industry. Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998). We agree with the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with "considerable skepticism." Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note Simpson's allegation that the contract was "hastily" presented for her signature.

Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms,[2] we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute.[3]

While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters,[4] the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be

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[2] *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document").

[3] Specifically, the arbitration clause prohibited an arbitrator from awarding double or treble damages.

[4] This included phrases in the "Disclaimer of Warranties" provision and the "Used Vehicle Disclosure". We note that S.C. Code Ann. § 36-2-316 (2003) requires disclaimers of implied warranties to be "conspicuous."

distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation. Accordingly, we find that when considered as a whole and in the context of an adhesion contract for a vehicle trade-in, the circumstances reveal that Simpson had no meaningful choice in agreeing to arbitrate claims with Addy.

B. Oppressive and one-sided terms

1. Limitation on statutory remedies in an arbitration clause

Addy contends that the arbitration clause's limitation on statutory remedies was not oppressive and one-sided. We disagree.

The arbitration clause in Simpson's contract with Addy provides that "[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." Simpson's underlying complaint filed in civil court alleged, among other things, that Addy violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). The SCUPTA requires a court to award treble damages for violations of the statute.[5] Similarly, the Dealers Act requires a court to award double damages for violations of the statute.[6] In arguing

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[5] *See* S.C. Code Ann. § 39-5-140(a) (1976) (providing that a "court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper" [emphasis added]).

[6] *See* S.C. Code Ann. A§ 56-15-110(1) (2006)

(continued...)

that this provision was not oppressive and one-sided, Addy relies on *Carolina Care Plan*. In that case, this Court held that the issue of whether an arbitration clause prohibiting an arbitrator from awarding "punitive damages" violated the public policy of the SCUTPA was not ripe for review. 361 S.C. 544, 606 S.E.2d 752. The Court explained that "an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUPTA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damage". *Id.* at 557, 606 S.E.2d at 759 (discussing *PacifiCare Health Systems v. Book*, 538 U.S. 401 (2003) (holding it was premature to conclude that meaningful relief for the plaintiff under RICO was unavailable in arbitration because the arbitrator may conclude that a restriction on "punitive damages" in an arbitration clause did not preclude the authorization of treble damages under RICO)).

Addy's comparison falls short. In fact, the present case requires the *Carolina Care Plan* analysis to be taken one step further because the arbitration clause at issue here goes beyond banning "punitive" damages generally and specifically prohibits an arbitrator from awarding statutorily required treble or double damages. Therefore, an arbitrator's ultimate classification of an award as "compensatory" or "punitive" is no longer relevant in an analysis of whether this particular clause is unconscionable: under this arbitration clause, treble and double damages — whether classified as compensatory or punitive — are prohibited outright.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has

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[6](...continued)
(providing that an individual "shall recover double the actual damages by him sustained" [emphasis added]).

two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statute's very purposes of punishing acts that adversely affect the public interest.[7] Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Accordingly, we find the provision prohibiting double and treble damages to be oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.

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[7] This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act. See *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000) ("It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public'"(*citing* S.C. Code Ann. §56-15-40(1) (1991))); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive", *aff'd in part, rev'd in part, on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992) (*per curiam*). The Dealers Act also specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code Ann. § 56-15-130 (2006).

2. Dealer's remedies not stayed pending outcome of arbitration

Addy argues that the arbitration clause's provision reserving certain judicial remedies to the dealer and authorizing the award of the dealer's remedies even if the consumer's arbitration proceedings have not concluded is not oppressive and one-sided. We disagree.

While stating that "all disputes, claims or controversies between Dealer and Customer" are to be settled in binding arbitration, the arbitration clause notes several exceptions. Specifically, the clause provides:

> Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration.

[emphasis added].

Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (holding that an arbitration agreement between a consumer and a lender was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim in the foreclosure action); *Lackey v. Green Tree Financial Corp.*, 330 S.C. at 402, 498 S.E.2d at 905 (same). The primary basis for this conclusion in *Munoz* and *Lackey* was that requiring one party to seek a remedy through arbitration rather than the judicial system did not deprive that party of a remedy altogether. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365. The *Lackey* court additionally explained that the judicial remedies which the lender in that case had reserved for itself (i.e. replevin

and foreclosure actions) provided specific procedures for protecting the collateral and the parties during the pendency of the arbitration proceedings. *Lackey*, 330 S.C. at 401, 498 S.E.2d at 905. Because these protections related to both parties and were facilitated by enforcement procedures specified by law, the court of appeals concluded that, regardless of the lack of mutuality of remedy, the arbitration clause bore "a reasonable relationship to the business risk" inherent in secured transactions. *Id.*

However, the essence of Simpson's unconscionability claim is not the general lack of mutuality of remedy, but rather the arbitration agreement's express stipulation that the dealer may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration. The clauses at issue in *Munoz* and *Lackey* contained no such directives. To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle. As the arbitration agreement between Simpson and Addy is written, the dealer collects on a judgment awarded in a judicial proceeding regardless of any protections for the collateral afforded by law. Addy's suggestion that there are procedural motions[8] available to the consumer which offset any potentially inconsistent effects of this provision, in our opinion, shows an informal acknowledgment on the part of Addy that such a provision on its face is indeed one-sided. These procedural mechanisms only act to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration.

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[8] Specifically, Addy suggests that a motion for protective order or a motion to stay pending arbitration.

We continue to abide by our previous holdings in *Munoz* and *Lackey* that lack of mutuality of remedy will not invalidate an arbitration agreement. However, we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum. Accordingly, in light of Simpson's lack of meaningful choice in agreeing to arbitrate, the provision is unconscionable and unenforceable.

3. Limitation on bringing warranty claims in a judicial forum

Addy argues that Simpson may not attack the arbitration clause on the grounds that it violates the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C.A § 2301 *et seq.* (1997), because Simpson's underlying claims alleged no violation of the MMWA. We disagree.

The arbitration clause in the contract between Simpson and Addy states that it applies to "any and all disputes" including "automobile warranty" and "any consumer protection statutes" all of which implicate the MMWA.

The provision further specifies that such matters are to be resolved only by "binding arbitration."

Rules promulgated by the Federal Trade Commission (FTC) state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). *See also Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321 (11th Cir. 2001). Moreover, the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty. *See Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1437-38 (M.D. Ala. 1997). Therefore, the federal government has made it clear that parties may not agree to arbitrate an MMWA claim as the arbitration clause between Simpson and Addy attempted to do here.

This Court will not enforce a contract which is

violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. The fact that Simpson did not bring a claim under the MMWA is irrelevant to our conclusion that the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy. Accordingly, we hold that this provision of the arbitration clause is an unconscionable and unenforceable violation of public policy.

C. Severability

In the alternative to its argument that the arbitration clause is not unconscionable, Addy suggests that any provision found by this Court to be unconscionable may be severed from the clause and arbitration allowed to otherwise proceed. In fact, it seems as though the "Additional Terms and Conditions" section of the contract anticipated just such a scenario. Paragraph fifteen (15) articulates a severability clause providing that:

> In the event any provision of this contract shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

We disagree. In consideration of the federal and state policies favoring arbitration agreements, severability clauses have been used to remove the unenforceable provisions in an arbitration clause while saving the parties' overall agreement to arbitrate. *See Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So. 2d 1095, 1098 (Fla. Ct. App. 2d Dist. 2002) (holding that an arbitration clause was divisible and therefore a severability provision acted to remove the unenforceable provision from the arbitration clause without affecting the intent of the parties); *Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631, 635 (Ga. Ct. App. 1995) (upholding the trial court's application of a severability clause to an arbitration

agreement "in light of the liberal federal policy favoring arbitration agreements and the parties' intentions in entering into those agreements"). Additionally, legislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties" the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Internat'l Inc*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.[9]

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[9] We acknowledge that in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy

(continued...)

[9](...continued)
for an unconscionable provision in an arbitration clause. However, we find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy. First, the arbitration clause in the contract between Simpson and Addy contained a total of three unconscionable provisions while arbitration clauses examined by courts prescribing severability generally contained only one offending provision. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); *Safranek v. Copart, Inc.*, 379 F.Supp. 2d 927 (D. III. 2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766 (Ala. 2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); *Healthcomp Evaluation Servs. Corp.*, 817 So. 2d 1095 (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award). *But see Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631 (severing two provisions governing the eligibility of arbitrators and the judicial review of an arbitration). Second, two of the provisions in this case were found unconscionable because the provisions contravened state and federal consumer protection law. The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but twice, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy. *See Graham Oil Co.*
(continued...)

Additionally, we note that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. Therefore, in holding today that the arbitration clause in the vehicle trade-in contract between Addy and Simpson is unconscionable due to a multitude of one-sided terms, we do not overrule our decision in *Munoz* where we held that an adhesion contract between a consumer and a lender was not unconscionable because it lacked mutuality of remedy. Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.

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[9](...continued)
v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994) (noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted)). Accordingly, while this Court generally would encourage severability of an unconscionable provision, we do not view the arbitration agreement between Simpson and Addy to be a proper candidate for the application of this remedy. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003); (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"; *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp. 2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutoryrights ... the Court finds that the better course of action in this case is to excise the arbitration clauses altogether. ").

Accordingly, we affirm the trial court"s denial of the motion to compel arbitration.

III. Presentation of evidence to determine unconscionability

Addy argues that the trial court erred in failing to provide Addy a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause in order to aid the court in making a determination on unconscionability. We disagree.

S.C. Code Ann. § 36-2-302(2) (2003) provides:

> When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Simpson filed her memorandum in opposition to Addy's motion alleging the unconscionability of the arbitration clause on March 16. After a motion hearing that same day, the trial court ordered mediation. When mediation failed, the court ordered Addy to submit a memorandum in support of its motion, which it did on July 13. The court considered the arguments in both memoranda before issuing its order on August 12.

In our opinion, the four months that passed between Simpson's memorandum and Addy's response was a "reasonable opportunity" for Addy to consider Simpson's arguments and respond with respect to the commercial setting, purpose, and effect of the arbitration clause. Accordingly, the trial court's consideration of the parties' memoranda without a hearing did not deny Addy a reasonable opportunity to present its evidence in order to aid the court's determination.

Conclusion

For the foregoing reasons, we find the arbitration clause between Simpson and Addy unconscionable and unenforceable in its entirety. Accordingly, we affirm the trial court's denial of Addy's motion to stay litigation pending arbitration.

Appendix B
Order Denying Petition for a Rehearing

The Supreme Court of South Carolina

May 23, 2007

James B. Richardson, Jr., Esquire
1229 Lincoln St.
Columbia, SC 29201

Joseph Gregory Studemeyer, Esquire
1804 Bull St.
Columbia, SC 29211-2201

Re: Simpson, Sherry v. MSA of Myrtle Beach

Dear Counsel:

The Court has issue the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Justice John H. Waller, Jr., not participating.

May 23, 2007."

Yours truly,

s/ Daniel E. Shearouse
Clerk of Court

Appendix C
15 U.S.C. § 2310(a) of the Magnuson-Moss Warranty Act

§ 2310(a)

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commissions rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,
(B) such procedure, and its implementation, meets the requirements of such rules, and
(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then

(i) the consumer may not commence a civil action

(other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and

(ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

Appendix D
15 C.F.R. § 703.5(j)
Federal Trade Commission

§ 703.5 Operation of the Mechanism.

* * * * *

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.